

The SALJ awarded claimant permanent partial disability benefits for a 15% functional impairment to the right leg after reducing claimant's functional impairment by 5% for preexisting impairment. The SALJ found claimant sustained no lumbar spine

impairment. The SALJ determined claimant was not entitled to work disability because he was terminated for cause and employed for higher wages with a subsequent employer. The SALJ also found claimant's termination for cause excluded him from receiving temporary total disability (TTD) benefits following termination. The SALJ determined claimant's preinjury average weekly wage was \$1,003.60. Finally, the SALJ awarded claimant future medical benefits to be considered upon proper application.

Claimant asserts he should be awarded a 15% whole body functional impairment due to his right knee and low back injuries. Claimant also asserts he should be awarded TTD benefits and a work disability. Claimant maintains he was not terminated for cause. Claimant submits his average weekly wage is \$1,130.36. Claimant asks the Board to affirm the ALJ's finding on future medical benefits.

Respondent contends claimant failed to prove personal injury by accident arising out of and in the course of his employment because his injuries resulted from an idiopathic cause. Respondent alternatively asserts claimant's low back injury was not caused by his accident. Respondent submits claimant's average weekly wage is \$768.01. Respondent asserts claimant's award should be limited to the 15% functional impairment for his right knee and claimant should not be allowed to apply for future medical benefits.

The issues are:

1. Did claimant sustain right knee and low back injuries by accident arising out of and in the course of his employment with respondent? Specifically, did claimant's right knee and low back injuries arise from an idiopathic cause?
2. What is claimant's functional impairment?
3. Was claimant terminated for cause, thus precluding TTD benefits and a work disability award?
4. What is claimant's average weekly wage?
5. Should claimant be allowed to withdraw his stipulation that he was not seeking future medical benefits? If so, is claimant entitled to apply for future medical benefits?

#### **FINDINGS OF FACT**

Claimant was a carpenter for 20 years prior to working for respondent. Claimant indicated he began working for respondent as a general carpenter on November 24, 2012. Claimant testified that before his accident, he was never disciplined by respondent and had no complaints about his work. Claimant testified he was late one day each of the first two weeks he worked because of problems with his truck. Respondent's policy is that if you are late, you are not allowed to work that day. Consequently, claimant missed work the

two days he was late. Beginning December 15, 2012, claimant was sick 2½ days, but had a doctor's excuse accepted by respondent.

On January 17, 2013, claimant was working on a job at Fort Leonard Wood, Missouri, installing exit devices and door closures. He was working on a ladder and had finished installing a door closure when he stepped down with his right foot and his knee gave way. He fell back, landed on his right hip and back, and the ladder fell on top of him. Claimant indicated he was descending the ladder in a normal fashion and did not jump off or skip any rungs. His right knee was bearing his weight and it buckled and totally gave out. Claimant was wearing work boots and he indicated they did not slip off the rung or get hung up on the ladder. The ladder did not malfunction, break or tip. He had nothing in his hands and was using his left hand for support.

Claimant indicated that prior to his accident, he never received treatment to his right knee, right hip or back. He testified that after falling, his back, right hip and right knee hurt and he could barely walk. He immediately reported the accident to his supervisor. Claimant went to an immediate care hospital and a brace was placed on the knee.

The day after the accident, claimant returned home. He continued working for respondent sorting screws and sweeping. The week of February 4, 2013, claimant had a discussion with his supervisor, Nick Acheson. According to claimant, Mr. Acheson said he was going to let claimant go on workers compensation because he could not afford to pay claimant to sit around and sort screws. Mr. Acheson told claimant his light duty would end on February 7, 2013. On February 5, claimant again was late 10 minutes, but made up the time by working through lunch.

According to claimant, on Wednesday, February 6, 2013, Mr. Acheson brought up the fact claimant was late the day before and Mr. Acheson became very mad. Claimant testified Heather Leach, whom he believed was a secretary, attempted to participate in the conversation and he politely told her the conversation was between him and Mr. Acheson. Claimant indicated he did not use profane language when speaking to Ms. Leach. Claimant testified he was told by Mr. Acheson to leave, but was never told by Mr. Acheson that he was terminated. Claimant testified he thought he was going to receive TTD benefits. Claimant contacted respondent's insurance adjustor, who told claimant he would not receive TTD benefits because he was terminated. Claimant indicated that was the first time he learned he was terminated.

Claimant testified he was paid several different hourly rates by respondent, but his base pay was \$18 per hour. His pay periods were Saturday through Friday. Claimant calculated as of the date of his accident, he worked for respondent 6.21 weeks and earned \$7,019.56. Claimant's first weekly wage record had a note indicating he began working for respondent on November 26, 2012, but missed his first day due to car trouble.

Claimant's weekly wage records show the following earnings:

Pay Period	Hours	Gross Wages
November 24-30, 2012	30	\$ 752.70
December 1- 7, 2012	40	\$1,003.60
December 8-14, 2012	40	\$1,003.60
December 15-21, 2012	15	\$ 376.35
December 22-28, 2012	30	\$ 717.25
December 29, 2012 - January 4, 2013	24	\$ 602.16
January 5-11, 2013	40	<u>\$ 995.10<sup>1</sup></u>
Total Wages:		\$5,450.76

Claimant believes that as a result of his back and right knee injuries, he can no longer physically perform the work of a carpenter.

Mr. Acheson, respondent's director of field operations and claimant's supervisor, testified claimant was paid hourly, paid only if he worked and was not guaranteed a certain number of hours per week. If no work was available or the weather was bad, claimant was not paid. He testified respondent did not work on Christmas and claimant requested time off that week to get married. Mr. Acheson also agreed respondent's time sheets showed employees were given one and one-half days off work for New Year's.

Mr. Acheson testified claimant was "terminated over his reaction, the way he treated [other] employees, as well as he had some other tardies prior."<sup>2</sup> Mr. Acheson indicated that on the day claimant was terminated, he was late by 10 to 15 minutes. Mr. Acheson confronted claimant about being late and Heather Leach, respondent's former government project coordinator, was present. According to Mr. Acheson, he and Ms. Leach were speaking to claimant when claimant became vulgar and told Ms. Leach not to get involved in the conversation. Mr. Acheson thought he made it clear to claimant that he was terminated. He told claimant he would notify the insurance carrier and asked claimant to return all his items. Claimant turned in all his items before leaving the premises that day.

A copy of respondent's employee handbook containing its disciplinary policy was introduced. The disciplinary policy is a seven-step progressive policy designed to give the employee an opportunity to correct his or her behavior and meet work standards. Some offenses are serious enough to warrant immediate discharge. Mr. Acheson indicated he did not give claimant progressive discipline because he was in his probationary period and

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<sup>1</sup> The pay period of January 12-18, 2013, was omitted because under K.S.A. 2012 Supp. 44-511(b)(1), wages earned during the week of an injured worker's accident are not used to calculate average weekly wage.

<sup>2</sup> Acheson Depo. at 13.

respondent's discipline policy does not require supervisors to use the progressive policy during an employee's probationary period.

An email dated February 4, 2013, from Mr. Acheson to insurance adjustor Patricia A. Nigh indicated claimant was in his "90 day probationary period and due to his many missed days/stories he tells, and attitude towards others we wish to let him go . . . ."<sup>3</sup> Mr. Acheson admitted the decision to terminate claimant was made prior to the February 6, 2013, incident with Ms. Leach. Mr. Acheson agreed claimant performed his work adequately prior to his termination.

Ms. Leach testified she was present when Mr. Acheson terminated claimant. She testified claimant gave Mr. Acheson "a lot of attitude and making excuses for work that they were trying to give him so he can earn a paycheck."<sup>4</sup> According to Ms. Leach, when she tried to participate in the conversation, claimant made an obscene gesture toward her and used profanity to tell her to stay out of the conversation. Ms. Leach indicated claimant was not polite, knew she was not a secretary and Mr. Acheson did not yell at claimant.

Claimant testified that after being terminated by respondent, he worked for Key Management for approximately two to three weeks, performing light maintenance and he made \$13 per hour. He indicated he left Key Management because they were cutting hours. Key Management records indicate claimant received three paychecks on August 16, 30 and September 13, 2013. Claimant completed a medical information form for Key Management on July 29, 2013, indicating he had no back or leg injury or disorder.

According to claimant, after leaving Key Management, he went to work for Newcomer Plumbing for about five weeks, making \$19 per hour. During three of the five weeks, claimant worked 60, 60 and 68 hours and received overtime. Claimant indicated he never kneeled or crawled and primarily supervised two other workers, helping guide them and showing them what to do. He quit Newcomer on April 17, 2014, because the next job was out of state and he did not want to travel. At the end of his job with Newcomer, claimant injured his hand.

Joel Newcomer, owner of Newcomer Plumbing, testified he hired claimant as an apprentice plumber installing hangers while on a lift. Claimant cut and installed copper pipe in the hangers, soldered some of the copper pipe and installed waste and vent plastic pipe. Mr. Newcomer testified claimant was paid \$19 per hour and \$100 per week per diem. Mr. Newcomer saw claimant work on two or three occasions and did not observe claimant have difficulty performing his job. Nobody reported to Mr. Newcomer that claimant had difficulty performing the work. Mr. Newcomer testified that on April 8, 2014, claimant broke

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<sup>3</sup> *Id.*, Ex. 1.

<sup>4</sup> Leach Depo. at 7.

a finger at Newcomer Plumbing and began receiving workers compensation disability checks while off work. Mr. Newcomer was under the impression claimant wanted to return to work once his injury healed.

Claimant first saw Dr. Rahila Andrews on February 4, 2013, for right knee and lumbar back pain. Claimant reported stepping off a ladder and his right knee buckled, causing him to fall and land on his right side. The doctor diagnosed claimant with right knee pain and a right hip contusion. Dr. Andrews was not able to determine why claimant's knee buckled. She noted claimant had no lumbar spine bruising or swelling, but had pain to palpation over the right sacroiliac joint. Dr. Andrews prescribed a knee brace, ordered a right knee MRI and gave temporary restrictions of no kneeling, crawling, climbing or using ladders; limit squatting and using stairs to less than 50% of the time; careful use of the back; and limit bending over and twisting at the waist.

Dr. Andrews saw claimant again on February 12, 2013. The doctor again noted claimant had no lumbar spine bruising or swelling. According to Dr. Andrews, the right knee MRI showed a full-thickness cartilage defect with underlying cystic change, possibly degenerative or could occur with a severe twisting or impact injury such as a fall with direct impact to the front of the knee, anterior cruciate ligament rupture or a dislocation of the patella. She noted the MRI showed claimant's ligaments were intact and his mechanism of injury suggested twisting, but he did not fall on his knee. The doctor stated it was difficult to determine if claimant's chondral injury was work related and referred him to an orthopedic surgeon, Dr. Lowry Jones, Jr.

Dr. Jones saw claimant on February 18, 2013. He reviewed claimant's MRI and assessed a patellar lesion and acute subchondral edema under the area of the defect. The doctor indicated there may have been some preexistent disease process, but claimant denied any previous right knee injury and there was no indication of preexistent disease by x-ray or clinical exam. Dr. Jones recommended arthroscopy and stated the prevailing factor for the need for treatment was claimant's January 17, 2013, injury.

On March 15, 2013, Dr. Jones performed a right knee arthroscopy. The doctor noted a large articular fracture of the patella and a medial femoral condyle lesion. The doctor performed a chondroplasty of the medial femoral condyle and of the undersurface of the patella. Due to the surgery, claimant was taken off work ten days and then restricted to perform sedentary work. On April 15 and May 13, 2013, claimant was given restrictions of alternating sitting and standing as needed and no kneeling, squatting or crawling. Postoperatively, claimant attended physical therapy. Dr. Jones determined claimant reached maximum medical improvement (MMI) on June 10, 2013, and released claimant without restrictions.

Dr. Jones opined, using the *Guides*,<sup>5</sup> claimant had a 20% permanent functional impairment of the right lower extremity at the level of the knee with 5% for preexisting disease. Dr. Jones testified claimant had a patellar articular cartilage injury caused by stepping off the ladder. When asked by respondent's counsel if claimant might need future medical treatment, Dr. Jones agreed, explaining:

Well, the natural history of what he had, the lesion of his patella, which is specifically what we'll isolate this to, the medial femoral condyle wasn't that significant, that will be progressive and those will routinely with normal activity, particularly any kind of construction activity, likely result in a re-arthroscopy in three to five years.<sup>6</sup>

The doctor agreed that because working in heavy construction would increase the likelihood of another arthroscopy, it would be prudent for claimant to avoid working heavy construction to protect his right knee.

Claimant, for his lumbar back pain, continued seeing Dr. Andrews. On March 11, 2013, he complained of right lumbar back pain that was worse than his right knee. The doctor provided claimant a trigger point injection, told him to use ice and heat, continued his Meloxicam, Lortab and Flexeril and ordered physical therapy.

Dr. Andrews again saw claimant for lumbar back pain on May 2, 2013, and indicated that if his back pain persisted after his physical therapy, she would order a lumbar MRI. Claimant was tender to palpation over the right lumbar back at the top of the hip with moderate spasm. When Dr. Andrews saw claimant on May 17, 2013, he still had right low back pain and had completed four weeks of physical therapy, which was extended an additional month.

On June 11, 2013, Dr. Andrews ordered a lumbar MRI. On June 19, 2013, during Dr. Andrews' last visit with claimant, they discussed his lumbar MRI results. According to the doctor, the MRI revealed mild degenerative changes including disc desiccation, tiny annular tears at L2-3 and L3-4, a trace disc protrusion at L2-3, a small disc protrusion at L4-5 and a mild disc bulge at L5-S1. Dr. Andrews testified the disc protrusion at L4-5 fell under the umbrella of mild degenerative changes. The doctor testified claimant likely sustained a soft tissue injury in the lower back muscle or myofascial pain that was now chronic. She indicated claimant's chronic low back symptoms would not improve and he was at MMI.

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<sup>5</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>6</sup> Jones Depo. at 16.

Dr. Andrews testified the annular tears could be caused by aging or trauma and there was no way to determine from the MRI when the tears occurred. Dr. Andrews would not attribute claimant's degenerative changes to his work injury and recommended he see his primary care physician for treatment. Dr. Andrews opined the findings on the MRI did not indicate claimant's fall was the prevailing factor for his persistent back pain. Dr. Andrews also testified claimant's work accident was not the prevailing factor giving rise to any permanent impairment of function in the lumbar spine.

Dr. Andrews indicated that when she completed a form for the insurance carrier stating claimant had no permanent functional impairment, she did not consult the *Guides*. However, she reviewed the *Guides* at her deposition and her opinion did not change. The doctor indicated she did not provide claimant formal restrictions for his back condition, but told him to limit activities that cause back pain. If claimant had asked Dr. Andrews if he could return to his former employers or former types of work, Dr. Andrews would have encouraged him to do so.

At the request of his counsel, claimant was evaluated by Dr. Edward J. Prostic on September 3, 2013. Dr. Prostic indicated claimant denied previous difficulties with his low back or right knee. The doctor reviewed the medical records of Drs. Andrews and Jones, examined claimant's lumbar spine and right lower extremity and took x-rays of his right knee. Dr. Prostic diagnosed claimant with a chronic lumbar strain and sprain. Dr. Prostic felt claimant's fall caused a central disc protrusion at L4-5 noted in claimant's MRI report. Dr. Prostic acknowledged claimant's MRI also showed mild degenerative changes that tend to be asymptomatic. He indicated claimant's work accident either resulted in a traumatic injury that caused permanent problems and impairments or it aggravated an asymptomatic degenerative condition to cause permanent complaints and impairments.

Dr. Prostic opined claimant's work accident was the prevailing factor causing his injuries, medical condition, need for medical treatment and resulting disability. Dr. Prostic agreed a traumatic event can cause asymptomatic mild degenerative changes noted on an MRI to become symptomatic. The doctor assessed a 7% whole person permanent functional impairment for claimant's lumbar back injury and a 20% right lower extremity functional impairment which combined for a 15% whole person functional impairment. The doctor was not asked if claimant had a preexisting right knee functional impairment. Dr. Prostic restricted claimant to medium level employment, minimal squatting and avoiding more than occasional climbing or kneeling. The doctor opined claimant could no longer perform 8 of 11 job tasks identified by vocational consultant Michael J. Dreiling for a 73% task loss.

Claimant, at respondent's request, was evaluated by orthopedic surgeon Dr. Alexander S. Bailey on January 20, 2014. The doctor reviewed claimant's medical records and MRIs, took a history and physically examined claimant. Claimant reported his knee buckled when stepping off a ladder, but gave no further explanation. Dr. Bailey's report assessed claimant with degenerative lumbar spine changes without significant



abnormality and a right knee chondral injury with status post arthroscopic debridement and chondroplasty without ongoing sequelae. However, he testified his diagnosis related to the fall was a low back strain with no specific sequela. Dr. Bailey testified claimant's MRI findings were very common and barely present. In Dr. Bailey's opinion, the findings on the MRI were not acute, nor related to claimant's work injury. The doctor indicated claimant's lumbar spine findings were not significant enough for treatment.

Dr. Bailey opined the prevailing factor for claimant's right knee injury was his January 17, 2013, work-related accident, but opined claimant's fall at work was not the prevailing factor causing his lumbar spine conditions. Rather, the prevailing factor was claimant's degenerative condition. Dr. Bailey agreed that Dr. Andrews giving claimant a trigger point injection and noting moderate muscle spasms are indications claimant had an acute low back muscular injury.

Using the *Guides*, Dr. Bailey determined claimant has a 0% functional impairment for his lumbar spine condition and concurred with Dr. Jones' 15% right knee impairment rating. The doctor testified that using the injury model of the *Guides*, claimant was in Lumbosacral DRE Category I. Dr. Bailey agreed that under Section 15.3 of the *Guides*, pain can result in a permanent functional impairment, but he did not rate under the pain chapter of the *Guides* because pain is not definable or provable. The doctor indicated there was no need to assign claimant permanent work restrictions. Dr. Bailey did not recommend any additional or future medical treatment.

At the request of claimant's attorney, Mr. Dreiling performed a vocational assessment of claimant. He interviewed claimant and was provided medical records and restrictions of Drs. Andrews, Jones and Prostic. Based upon Dr. Prostic's restrictions, claimant's education and job vacancies in claimant's geographic area, Mr. Dreiling opined claimant's realistic earning capacity was \$9.50 per hour. Mr. Dreiling did not identify the types of jobs where claimant might become employed. Mr. Dreiling was unaware of claimant's post-injury employment history, including the wages claimant earned and the job tasks he performed.

Vocational consultant Michelle Sprecker, at the request of respondent, performed a vocational assessment of claimant. She interviewed claimant and was provided medical records and restrictions of Drs. Andrews, Jones, Bailey and Prostic and Mr. Dreiling's report. Ms. Sprecker indicated claimant was given no permanent physical restrictions by Drs. Andrews, Jones and Bailey and could return to his preinjury job without any wage loss.

Ms. Sprecker testified claimant reported he was terminated by respondent because when he ran out of work, his boss released him and told him to go on workers compensation, but he did not know why or when he was terminated. Claimant did not mention a verbal altercation. Claimant indicated to Ms. Sprecker that he left Key Management because his hours were reduced and quit Newcomer Plumbing because his job in Kansas was ending and they wanted him to work in a different state.

At the regular hearing, claimant's attorney indicated claimant was not requesting future medical benefits. Claimant's terminal date was June 9, 2014, and respondent's terminal date was July 9, 2014. Respondent took Dr. Jones' deposition on June 17, 2014. As noted earlier, Dr. Jones testified claimant's right knee would likely need future medical treatment. Respondent filed its submission letter on July 8. On July 10, 2014, claimant filed a supplemental submission letter and a motion amending his stipulations to request future medical treatment. Respondent objected to claimant's motion.

The SALJ, on July 24, 2014, issued an order granting claimant future medical benefits. The Board vacated the order, indicating the SALJ did not hold a hearing on claimant's motion. On remand, the SALJ held a motion hearing. Claimant's counsel argued respondent's counsel raised the issue when he asked Dr. Jones about future medical treatment. Claimant offered to pay the cost of respondent redeposing Dr. Jones or allow respondent to depose another physician. Claimant also argued respondent failed to show it would be prejudiced if the motion was granted.

Respondent asserted it would have asked Dr. Jones additional questions had it known future medical treatment was an issue. Respondent noted it was not waiving the argument that claimant's late request to withdraw his stipulation was erroneous. Respondent argued claimant's motion should be denied because it was filed after respondent's terminal date and after it deposed its expert, Dr. Bailey.

In a November 20, 2014, Order, the SALJ stated: "After hearing remarks of counsel and review of the file, it is determined that the motion to amend the stipulations to add the issue of future medical treatment is granted."

#### **PRINCIPLES OF LAW AND ANALYSIS**

1. Claimant's accidental right knee and low back injuries arose out of and in the course of his employment with respondent.

The Workers Compensation Act (Act) places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>7</sup> "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."<sup>8</sup>

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<sup>7</sup> K.S.A. 2012 Supp. 44-501b(c).

<sup>8</sup> K.S.A. 2012 Supp. 44-508(h).

K.S.A. 2012 Supp. 44-508(f)(3)(A)(iv) provides that arising out of and in the course of employment does not include an accident or injury that arose directly or indirectly from an idiopathic cause. Respondent alleges claimant's accident and injury arose from an idiopathic cause because claimant never explained why his right knee buckled when stepping down from the ladder at work. The Board disagrees.

Claimant's accidental injury arose out of and in the course of his employment. Claimant's employment exposed him to climbing and descending ladders, which caused his accidental injury.<sup>9</sup> Claimant's accidental injury was due to a workplace risk, not a neutral risk. Similarly, claimant's accident did not arise directly or indirectly from an idiopathic cause, such that it is not compensable. "Doctors use the term idiopathic to refer to something for which the cause is unknown."<sup>10</sup> The cause of claimant's accidental injury is known – he was on a ladder stepping down when his knee buckled.

The Board finds claimant sustained personal injury by accident arising out of and in the course of his employment with respondent. Dr. Andrews, claimant's treating physician, gave claimant a trigger point injection approximately two months after his work accident and noted claimant had muscle spasms in his back. Dr. Andrews indicated claimant had a chronic back condition. Dr. Prostic opined the prevailing factor for claimant's low back injury was his fall from the ladder. Even respondent's expert, Dr. Bailey, acknowledged claimant had a low back strain.

2. Claimant sustained a 20% right leg impairment. Respondent is entitled to a 5% credit for claimant's preexisting right knee condition. Claimant failed to prove a low back impairment.

The parties agreed claimant has a 20% functional impairment of the right knee, but disagreed whether claimant had a preexisting functional impairment. Claimant argues Dr. Jones testified he was not aware of claimant having any prior impairment rating to the right knee or prior limitations of activities with regard to the right knee.

The Board adopts the opinion of Dr. Jones that claimant had a 5% preexisting right knee functional impairment. Dr. Jones was claimant's treating physician and observed claimant's right knee during surgery. He was fully aware claimant had no prior knee symptoms, and yet opined claimant had a preexisting right knee functional impairment. Dr. Bailey deferred to Dr. Jones concerning claimant's right knee. Dr. Prostic indicated claimant denied previous difficulties with his right knee. However, Dr. Prostic did not opine

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<sup>9</sup> *Moore v. Venture Corporation*, 51 Kan. App. 2d 132, 343 P.3d 114 (2015).

<sup>10</sup> *Kuxhausen v. Tillman Partners*, 40 Kan. App. 2d 930, 935, 197 P.3d 859 (2008), *aff'd* 291 Kan. 314, 241 P.3d 75 (2010).

nor was he asked if claimant had a preexisting right knee functional impairment. That makes Dr. Jones' opinion credible and persuasive.

The Board finds more credible the opinions of Drs. Andrews and Bailey that claimant's back injury resulted in no permanent whole body functional impairment than the opinion of Dr. Prostic. Dr. Andrews was claimant's treating physician and was in the best position to evaluate claimant. Dr. Bailey testified claimant's MRI findings were very common and barely present. He opined, using the injury model of the *Guides*, that claimant was in Lumbosacral DRE Category I. Dr. Prostic provided claimant with a 7% whole person functional impairment, but provided little or no explanation as to how he arrived at that figure, other than it was in accordance with the *Guides*. Dr. Prostic did not indicate nor was he asked whether he was using the injury model or range of motion model. Claimant's low back complaints are predominantly subjective.

3. Claimant was terminated for cause.

K.S.A. 2012 Supp. 44-510c(b)(2)(C) provides:

If the employee has been terminated for cause or voluntarily resigns following a compensable injury, the employer shall not be liable for temporary total disability benefits if the employer could have accommodated the temporary restrictions imposed by the authorized treating physician but for the employee's separation from employment.

The Act does not define the term "termination for cause." Since the Act was amended in 2011, there have been no appellate court cases addressing termination for cause. In *Morales-Chavarin*,<sup>11</sup> a pre-2011 amendment appellate court case, the Kansas Court of Appeals stated:

It appears . . . that the proper inquiry to make when examining whether good cause existed for a termination in a workers compensation case is whether the termination was reasonable, given all of the circumstances. Included within these circumstances to consider would be whether the claimant made a good faith effort to maintain his or her employment. Whether the employer exercised good faith would also be a consideration. In that regard, the primary focus should be to determine whether the employer's reason for termination is actually a subterfuge to avoid work disability payments.

The Board approves the ALJ's finding that claimant was terminated for cause. Claimant had a history of being late to work and was late to work prior to and after his accident. Apparently, claimant had an "attitude" toward others prior to being terminated

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<sup>11</sup> *Morales-Chavarin v. National Beef Packing Co.*, No. 95,261, 2006 WL 2265205 (Kansas Court of Appeals unpublished opinion filed Aug. 4, 2006), *rev. denied* 282 Kan. 790 (2006).

as evidenced by Mr. Acheson's February 4, 2013, email. Claimant's behavior toward Ms. Leach supports Mr. Acheson's assertion claimant had an "attitude" toward others. Claimant was disrespectful to Ms. Leach, used profane language when speaking to her and made an obscene gesture. Given the circumstances, a reasonable person in Mr. Acheson's position would have terminated claimant.

Claimant argues he is entitled to TTD benefits and respondent argues claimant's termination for cause precludes TTD benefits. Dr. Jones took claimant off work for ten days following his March 15, 2013, knee surgery. Accordingly, claimant is entitled to TTD benefits from March 15 through 24, 2013. Claimant is not entitled to additional TTD benefits because he was terminated for cause and respondent could have provided him accommodated work.

Claimant is not entitled to a work disability for the following reasons:

1. Claimant sustained no permanent whole body functional impairment.
2. Neither Dr. Andrews nor Dr. Jones assigned claimant permanent restrictions. Dr. Andrews testified that if she was asked by claimant whether he could return to his former employers or former types of work, she would encourage claimant to do so. Claimant was physically capable of performing his former job duties and earning the same wages he made when working for respondent.
3. Claimant's post-injury job duties at Newcomer Plumbing indicate he is capable of performing job duties that require similar physical exertion as those job duties he performed at respondent. Claimant worked 60 or more hours per week three of the five weeks he worked for Newcomer Plumbing. Claimant's wages at Newcomer Plumbing were \$19 per hour. His base pay for respondent was \$18 per hour. The Board, taking into consideration the factors set forth in K.S.A. 2012 Supp. 44-510e(a)(2)(E), finds claimant has the capability of earning more than 90% of the wages he was earning at the time of his accidental injury.
4. On July 29, 2013, claimant signed a document for Key Management indicating he had no back or leg injury or disorder.
5. Claimant was terminated for cause. Consequently, his wage loss under K.S.A. 2012 Supp. 44-510e(a)(2)(E)(i) is not construed to be caused by his accidental injury.
4. Claimant's average weekly wage is \$778.68.

Mr. Acheson testified claimant was not guaranteed a certain number of hours each week and claimant was not paid if work was not available or the weather was bad. That was not disputed by claimant. Claimant asserts that as of the date of his accident, he worked for respondent 6.21 weeks and earned \$7,019.56, or \$1,130.36 per week.

Respondent asserts claimant worked six weeks and made \$4,608.06 for an average weekly wage of \$768.01. The ALJ multiplied an hourly wage of \$25.09 by 40 hours a week for an average weekly wage of \$1,003.60. That method was used prior to the 2011 amendments of the Act. The Board disagrees with all three calculations of claimant's average weekly wage, because they are not in accordance with K.S.A. 2012 Supp. 44-511(b)(1).

In calculating average weekly wage, the Board only considers calendar weeks prior to the date of accident.<sup>12</sup> K.S.A. 2012 Supp. 44-511(b)(1) states:

Unless otherwise provided, the employee's average weekly wage for the purpose of computing any compensation benefits provided by the workers compensation act shall be the wages the employee earned during the calendar weeks employed by the employer, up to 26 calendar weeks immediately preceding the date of the injury, divided by the number of calendar weeks the employee actually worked, or by 26 as the case may be.

The total wages of \$5,450.76 divided by seven calendar weeks claimant worked equals \$778.68.

5. Claimant may withdraw his stipulation that he was not requesting future medical benefits.

K.A.R. 51-3-8(e) provides: "Permission to withdraw admissions or stipulations shall be decided by the administrative law judge, depending on the circumstances in each instance."

The Board has not allowed a stipulation to be withdrawn where a party did not first present the issue to the ALJ or failed to ask the ALJ for permission to withdraw the stipulation.<sup>13</sup> The Board further indicated an ALJ has the discretion to allow a stipulation to be withdrawn.<sup>14</sup> We have also affirmed an ALJ's decision to set aside a stipulation that

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<sup>12</sup> *Martin v. Royal Valley Public Schools USD 337*, No. 1,060,837, 2013 WL 4051827 (Kan. WCAB July 1, 2013); *Evans v. A-1 Staffing*, Nos. 1,010,708 & 1,010,709, 2007 WL 1390694 (Kan. WCAB Apr. 5, 2007); *Rubalcava v. Hiland Dairy Company*, No. 231,943, 2000 WL 759345 (Kan. WCAB May 16, 2000); *Reed v. Central Sand Company, Inc.*, No. 216,797, 1999 WL 195262 (Kan. WCAB Mar. 30, 1999); and *Paniagua v. National Beef Packing Co., L.P.*, No. 205,469, 1998 WL 51339 (Kan. WCAB Jan. 27, 1998), *aff'd*, No. 80,669, 1999 WL 500733 (Kansas Court of Appeals unpublished opinion filed April 2, 1999).

<sup>13</sup> *Dougherty v. OCCK, Inc.*, No. 1,020,210, 2007 WL 3348526 (Kan. WCAB Oct. 9, 2007); *Varela v. IBP, Inc.*, No. 135,367, 1994 WL 749462 (Kan. WCAB Dec. 2, 1994), *aff'd*, No. 73,270, 1995 WL 693153 (Kansas Court of Appeals unpublished opinion filed Nov. 22, 1995).

<sup>14</sup> *Varela, supra*; see also *Polk v. Cessna Aircraft Company*, No. 201,056, 2000 WL 372285 (Kan. WCAB Mar. 31, 2000).

was inconsistent with the evidence and made in error, and where the ALJ allowed the parties additional time to submit evidence on the disputed issue.<sup>15</sup>

In the present claim, claimant sought relief from the SALJ and did not wait until appealing to the Board. An ALJ or SALJ has some discretion in determining if stipulations can be amended and under K.S.A. 2012 Supp. 44-523(a) is not bound by technical rules of procedure. Additionally, the Board finds respondent provided insufficient evidence it was prejudiced, when it was offered an opportunity to redepose Dr. Jones at claimant's expense and depose additional physicians.

The SALJ unequivocally allowed claimant to withdraw his stipulation. After much deliberation, the Board finds the SALJ correctly granted claimant's motion to withdraw his stipulation. It is apparent respondent was objecting to claimant's motion, even if the SALJ extended respondent's terminal date and gave it an opportunity to present additional evidence at claimant's expense.

#### **CONCLUSIONS**

1. Claimant sustained right knee and low back injuries arising out of and in the course of his employment with respondent.

2. Claimant sustained a 20% permanent functional impairment of the right leg with 5% preexisting his accident. Claimant failed to prove he sustained a whole person functional impairment for his low back injury.

3. Claimant was terminated for cause. Claimant is entitled to TTD benefits from March 15 through 24, 2013, and is not entitled to a work disability award.

4. Claimant's AWW is \$778.68.

5. Claimant is allowed to withdraw his stipulation that he was not requesting future medical benefits and he is entitled to apply for future medical benefits.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>16</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

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<sup>15</sup> *Munsch v. Dillon Companies, Inc.*, No. 203,713, 2000 WL 137168 (Kan. WCAB Jan. 27, 2000).

<sup>16</sup> K.S.A. 2013 Supp. 44-555c(j).

**AWARD**

**WHEREFORE**, the Board modifies the December 24, 2014, Award entered by SALJ Shelor. Claimant is entitled to receive 1.43 weeks of temporary total disability compensation at the rate of \$519.15 per week, or \$742.38, followed by 29.79 weeks of permanent partial disability compensation at the rate of \$519.15 per week, or \$15,465.48, for a 15% loss of use of the right leg at the level of the knee, making a total award of \$16,207.86, which is all due and owing less amounts previously paid.

The Board sets aside the SALJ's order approving the contract between claimant and his attorney because the attorney fees exceed the 25% limit imposed by K.S.A. 2012 Supp. 44-536(a).

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June, 2015.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Mark Beam-Ward, Attorney for Claimant  
mbeamward@bkwflaw.com

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Honorable Jerry Shelor, Special Administrative Law Judge

Honorable Rebecca Sanders, Administrative Law Judge